

STATE OF MICHIGAN  
COURT OF APPEALS

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GENEVA EDWARDS,

Plaintiff-Appellant,

v

PONTIAC SCHOOL DISTRICT, WALTER L.  
BURT, and WALLACE L. DUNN, JR.,

Defendants-Appellees.

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UNPUBLISHED

August 4, 2005

No. 261712

Oakland Circuit Court

LC No. 2003-051766-CD

Before: Borrello, P.J., and Bandstra and Kelly, JJ.

PER CURIAM.

Plaintiff, a schoolteacher in defendant's school district, was not hired for three assistant principal positions at high schools in the district and was not allowed to interview for a fourth assistant principal position at a middle school. Defendant Burt was the superintendent of the district, and defendant Dunn was the assistant superintendent of human resources and employee relations for the district. Plaintiff alleged that defendants discriminated against her because of her age in violation of the Civil Rights Act (CRA), MCL 37.2101 *et seq.* The trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

We review de novo a trial court's decision on a motion for summary disposition. *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001). A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support for a claim. *Id.* After reviewing the pleadings, affidavits, depositions, admissions, and any other evidence in a light most favorable to the nonmoving party, a trial court may grant summary disposition under MCR 2.116(C)(10) if there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998).

Plaintiff argues that the trial court erroneously dismissed her claim against the school district because she presented direct evidence of discrimination. Plaintiff testified that in a conversation with Dunn concerning why she was not selected, he advised her that she needed additional credit hours in administration and supervision. She replied that she would take

additional hours. In response, he said that even if she took the hours, she would have “tough competition.” She responded, “Mr. Dunn, what you’re telling me is, no matter what I do, I will never get an administrative job in this school district.” According to plaintiff, Dunn did not respond to her comment but told her, “you remind me of somebody’s mother.”

Direct evidence of discrimination is “evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer’s actions.” *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 133; 666 NW2d 186 (2003) (citations and internal quotation marks omitted). Racial slurs and derogatory remarks about one’s race made by a decisionmaker are examples of direct evidence of racial discrimination. *Harrison v Olde Financial Corp*, 225 Mich App 601, 610; 572 NW2d 679 (1997). Statements by a decisionmaker such as, “If I have to, I will get rid of the older guys—you older guys and replace you with younger ones,” were deemed “direct evidence” of discrimination in *Downey v Charlevoix Co Bd of Co Rd Comm’rs*, 227 Mich App 621, 633-634; 576 NW2d 712 (1998). Viewed in the light most favorable to the plaintiff, a supervisor’s statement, “[You’re] getting too old for this shit,” made during the conversation in which he terminated the plaintiff was found to be sufficient direct evidence of discrimination to survive summary disposition in *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 538-539; 620 NW2d 836 (2001). Our Supreme Court recognized that a factfinder may conclude that the “facially incriminating remark” was “an expression of sympathy,” but held that such weighing of evidence was for the factfinder, not a court reviewing a motion for summary disposition. *Id.* at 539.

In contrast to those statements, the remark “you remind me of somebody’s mother” in the context presented here does not rise to the level of direct evidence of discrimination. It is not a facially incriminating remark that may possibly have an innocent explanation, as in *DeBrow*. The remark is facially neutral. Indeed, plaintiff testified that she was uncertain what Dunn meant. Although the evidence is to be viewed in the light most favorable to plaintiff, this Court will not speculate whether a facially neutral comment is susceptible of an incriminating interpretation. In this case, the remark does not “require[] the conclusion” that discrimination was a motivating factor in the decisions and is not “direct evidence” of discrimination. *Sniecinski, supra* at 132-133.

Plaintiff also claims that a nod by then assistant superintendent Dr. Mildred Mason during a conversation with plaintiff constitutes direct evidence of discrimination.

So we were just talking, I said, you know, Dr. Mason, it just dawned on me, everybody they’ve been hiring happens to be much younger than I am, they didn’t hire me because of my age. She said, —no, she didn’t say anything. She said, her body, (shaking head affirmatively).

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I asked her. I said, it’s because of that, don’t you think? And that’s when she nodded her head in agreement. She didn’t say yes. She nodded her head as to say yes.

Mason's alleged head nodding is not legally admissible "direct evidence" of discrimination, because there is no evidence that she was involved in the decisionmaking process or had personal knowledge of the reasons plaintiff was not awarded the positions. At most, Mason's nod reflected her own opinion of defendants' motives. But pursuant to MRE 701, a lay opinion must be "rationally based on the perception of the witness" to be admissible. See *Wilson v General Motors Corp*, 183 Mich App 21, 35; 454 NW2d 405 (1990). There is no evidence that Mason's opinion was rationally based on her knowledge or perception of defendants' motivation for the decisions at issue. Therefore, plaintiff's account of Mason's nod is not legally admissible evidence, much less legally admissible direct evidence of discrimination.

Plaintiff also claims that she presented sufficient circumstantial evidence of discrimination to satisfy her burden under the burden-shifting approach set forth in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). We disagree. Assuming arguendo that plaintiff established a prima facie case of discrimination, defendants rebutted the presumption of unlawful discrimination by articulating a legitimate, nondiscriminatory reason for their decisions, i.e., that the other candidates were more qualified than plaintiff. *Sniecinski, supra* at 134. The burden then shifted back to plaintiff to show that the school district's reasons were not the true reasons, but a mere pretext for discrimination. *Id.*

Plaintiff cites as evidence of "age animus" the statement by Dunn, the nod by Mason, the "consistent pattern of passing over Mrs. Edwards in favor of younger employees," and Dunn's refusal to allow plaintiff to interview for the assistant principal position at a middle school. She also refers to testimony by Sandy M. McDonald, in which he recalled seeing another interview sheet at an unspecified time in the past in which plaintiff had "relatively a high score," placing her within the top three or four of six or seven candidates.

The evidence cited by plaintiff is insufficient to create an issue of fact regarding whether the school district's nondiscriminatory reason for the adverse employment action was a pretext, much less a pretext for discrimination. The statement by Dunn does not show discriminatory animus. Mason's nod is at most an inadmissible opinion about decisions in which she was not involved. The alleged pattern of passing over plaintiff and hiring other qualified but younger individuals is pertinent to plaintiff's prima facie case, but it is not enough to enable a reasonable factfinder to conclude that discriminatory animus was more likely than not a substantial or motivating factor in the decisions. The fact that Dunn did not allow plaintiff to interview for another position also does not demonstrate that her age was a factor in any of the challenged decisions. McDonald's testimony that he recalled seeing that plaintiff had a relatively high score in another instance at some unspecified time does not demonstrate that the tally sheet for the 2002 interview was incorrect, much less that defendants' reasons for the decisions at issue were a pretext for discrimination. Therefore, the trial court properly granted summary disposition in favor of the school district.

Since this appeal was filed, our Supreme Court has ruled that individual defendants may be held liable under the CRA. *Elezovic v Ford Motor Co*, 472 Mich 408, 411, 431; 697 NW2d 851 (2005). However, plaintiff has not properly presented her arguments regarding the individual defendants under *Elezovic*, having not filed a supplemental brief on the matter. MCR

7.212(F). Further, our conclusion that plaintiff failed to meet her burden of proof as to the school district would apply equally to her claims against the individual defendants.

We affirm.

/s/ Stephen L. Borrello

/s/ Richard A. Bandstra

/s/ Kirsten Frank Kelly